

BOROUGH OF SPRING LAKE, NEW JERSEY

**RESOLUTION ON NEW YORK SMSA LIMITED PARTNERSHIP, D/B/A
VERIZON WIRELESS APPLICATION TO LOCATE SIX SMALL WIRELESS
FACILITIES IN THE BOROUGH**

WHEREAS, on January 26, 2024, New York SMSA Limited Partnership, d/b/a Verizon Wireless (“Verizon”) filed an application, subsequently shown to be incomplete and to require supplementation on several separate occasions as hereafter specified, with the Borough of Spring Lake, New Jersey (the “Borough”), seeking to locate six (6) small wireless facilities (“SWFs”) on poles (“SWF poles”) intended to replace existing streetlights, along or adjacent to Ocean Avenue; and

WHEREAS, those specific locations where Verizon seeks to place poles and SWFs as described in the Verizon applications are:

1. JS Spring Lake 01 SC. Proposed utility pole that includes a SWF. Nearest to 2530 Prospect Avenue.
2. JS Spring Lake 02 SC. Proposed Replacement Smart Pole that includes a SWF. Nearest to 2021 Ocean Avenue.
3. JS Spring Lake 05 SC. Proposed Replacement Smart Pole that includes a SWF. Nearest to 1603 Ocean Avenue.
4. JS Spring Lake 07 SC. Proposed Replacement Smart Pole that includes a SWF. Nearest to 1111 Ocean Avenue.
5. JS Spring Lake 08 SC. Proposed Replacement Smart Pole that includes a SWF. Nearest to 300 Ocean Avenue.
6. JS Spring Lake 09 SC. Proposed Replacement Smart Pole that includes a SWF. Nearest to 803 Ocean Avenue; and

WHEREAS, the pole referred to as JS Spring Lake 01 SC is located on a right-of-way under the jurisdiction of the Borough, while all other poles in the application are located on

rights-of-way that are under the jurisdiction of both the County of Monmouth (“the County”) and the Borough; and

WHEREAS, in its application, Verizon correctly acknowledges that the placement of SWF poles at the locations specified is, in each instance, non-compliant with and prohibited by the Borough’s Ordinances (“the Borough Code”), and would therefore require a waiver of the Borough Code in order for the SWF poles and facilities to be installed; and

WHEREAS, Verizon recognized, in its initial application, that, for each required waiver, additional expert support would be required to show why the waivers are needed and requested leave to provide additional technical information in supplementation of its initial incomplete application; and

WHEREAS, Verizon’s application indicated that it would not own the poles upon which the SWFs would be attached; rather, the poles would be owned by SQF, LLC (“SQF”); and

WHEREAS, in contradiction of Verizon’s statement that all six (6) SWF poles will be owned by SQF, LLC, the application includes an attestation from Timothy Schneider, Secretary of SQF, LLC, stating that SQF will own five (5) of the SWF poles that are the subject of the application; and

WHEREAS, Verizon’s application notes that it intends to locate replacement light poles and remove existing streetlights in the applied-for locations, currently owned by Jersey Central Power & Light (“JCP&L”); and

WHEREAS, in its application Verizon asserts that “over the summer months” and, according to its network engineer, “particularly on summer weekends and holidays” there is a significant increase in demand and that its current network is insufficient to meet that demand, which inhibits the ability of residents and visitors to make and receive phone calls or text messages or use their devices to access the internet; and

WHEREAS, Chapter 330, Article VII of the Borough Code governs the placement of SWFs and SWF poles in the rights-of-way within the Borough; and

WHEREAS, Verizon's application states that it is filed pursuant to the Borough Code as well as pursuant to the Telecommunications Act of 1996, 47 USC Sections 253 and 332, N.J.S.A. 48:3-19, and N.J.S.A. 27:16-16; and

WHEREAS, pursuant to the Borough Code, Verizon is required to submit and did submit a proposed rights-of-way agreement granting it a license to locate SWFs on rights-of-way within the Borough, regardless of whether those rights-of-way are owned by or within the jurisdiction of the Borough or the County; and

WHEREAS, under New Jersey law, the Borough's consent is required before this kind of use can be permitted on County-owned roads within the Borough, *see*, N.J.S.A. 27:16-6; and

WHEREAS, before the SWF poles that are the subject of Verizon's application can lawfully be installed, Verizon will need, in addition to Borough approval, (i) to obtain approval of its separate application to the County, to install these facilities on a road within County jurisdiction, and (ii) to comply with all National Environmental Policy Act ("NEPA") requirements; and

WHEREAS, Verizon filed an application seeking County authorization to locate SWF poles on Ocean Avenue on May 10, 2023, which application was rejected by the County as insufficient on August 8, 2023; and

WHEREAS, thirteen (13) months later, Verizon filed another application with the County on September 18, 2024, and that application, too, was rejected by the County for incompleteness on October 4, 2024; and

WHEREAS, as of the date of this Resolution, Verizon has not resubmitted a complete application to the County or obtained the County's approval to place the SWF poles in the right-of-way under the jurisdiction of the County; and

WHEREAS, the Borough learned via an advertisement in the Coast Star newspaper on October 28, 2024 that Verizon was still in the process of complying with the NEPA process with respect to one (1) of the six (6) SWF poles (Verizon having never itself notified the Borough of its uncompleted NEPA compliance efforts); and

WHEREAS, after seeking additional information from Verizon, the Borough learned that one (1) of the six (6) sites had been determined to be exempt from NEPA earlier in this year, that the pending NEPA evaluation discovered by the Borough was for a second site, and that Verizon has not yet begun the process of seeking public comment and complying with other steps needed to determine whether any of the other four (4) sites will require the preparation of an environmental assessment under NEPA; and

WHEREAS, on November 1, 2024, Verizon's counsel advised the Borough's outside counsel that the process of pursuing NEPA compliance for the other four (4) sites would begin later that week; and

WHEREAS, Verizon has provided no further information to the Borough regarding the status of its NEPA compliance efforts; and

WHEREAS, while Section 330 of the Borough Code generally designates the Borough's Zoning Officer as the official to act upon applications filed for facilities in the rights-of-way, Section 330-71E of the Code also provides that the Borough may, in connection with any application, make modifications to that process; and

WHEREAS, on September 10, 2024, after proper notice and at its regular meeting, the Borough Council adopted a resolution determining that, for Verizon's application, which seeks waivers from the express requirements of the Borough Code, the decision will be made by the Borough Council; and

WHEREAS, pursuant to rules of the Federal Communications Commission ("FCC"), codified at 47 C.F.R. Section 1.6003(c)(1)(ii), which interpret the federal Telecommunications Act ("TCA"), 47 U.S.C. Section 332(c)(7)(B)(ii), the presumed reasonable time for a local government to act on an application for wireless facilities such as those that are the subject of Verizon's application is ninety (90) days; and

WHEREAS, the "presumed reasonable" time (often referred to as, and hereafter referred to as, "the shot clock") may be extended by agreement of the parties; and

WHEREAS, the "presumed reasonable" time to act is a legal presumption which may be overcome by the specific facts of a case; and

WHEREAS, Verizon and the Borough have entered into multiple tolling agreements which mutually extended the reasonable time to act upon Verizon's application through October 15, 2024; and

WHEREAS, Verizon has supplemented its application on numerous occasions, as further detailed below, and in each instance the supplement has provided material information that was omitted from Verizon's original application and that required technical review and analysis by the Borough; and

WHEREAS, on September 24, 2024, the Borough Council held a public meeting that included discussion of Verizon's application as an agenda item, at which numerous Borough residents expressed a desire and intent to submit evidence to the Council regarding Verizon's application for the Council's consideration and inclusion in the written record; Verizon was provided with advance notice of that public meeting and was invited to speak and present evidence at it; although Verizon did attend the meeting, it declined to speak or present any evidence at this meeting; and

WHEREAS, on September 30 and again on October 9, 2024, the Borough requested that Verizon extend the shot clock to allow sufficient time for the Borough and Verizon to review and evaluate significant evidence relating to Verizon's application that the Borough had, by that date, already received from its residents, including evidence prepared and submitted by attorneys engaged to represent Borough residents, as well as supplemental filings made by Verizon in late September and early October; and

WHEREAS, on September 30 and again on October 14, 2024, Verizon rejected the Borough's request to extend the shot clock; and

WHEREAS, on October 9, 2024, the Borough advised Verizon that, despite Verizon's September 30th rejection of the Borough's request, the Borough intended to hold a second and final public meeting relating to the Verizon application on November 12, 2024, and close the record at that time, following which the Borough would complete its review of the voluminous evidence received and issue a decision on the application on or about December 10, 2024; and

WHEREAS, Verizon was again invited to attend and present additional information supporting its application at the November 12, 2024 public meeting, and was additionally

encouraged to submit any written documentation it might have and wish to submit by November 12th to rebut or otherwise address the evidence submitted in opposition to its application; and

WHEREAS, Verizon declined to present any additional evidence or to speak at the public meeting of November 12, 2024; instead, four days before that scheduled meeting and the announced closure of the record, Verizon chose to file a complaint in federal court, in which it alleged that the Borough had unreasonably delayed its decision on the application and had thereby “effectively denied” it; and

WHEREAS, having reviewed Verizon’s initial application, the multiple additional filings and reports filed by Verizon, the multiple letters, submissions and reports filed by multiple citizens opposing the application; the input received from the public, including citizens and County officials, the Borough has now reached a decision on Verizon’s application based on a thorough review of the totality of the record.

NOW, THEREFORE, the Borough makes the following Findings and Conclusions regarding Verizon’s applications.

For sake of clarity, the Findings and Conclusions that follow will be addressed by topic.

I. FINDINGS

- A. **Record.** The written record in this matter, on which the Borough’s decision must be and is based, is extensive, and consists generally of Verizon’s initial application, Verizon’s supplemental submissions, correspondence between Verizon’s representatives and Borough representatives, recordings of two public meetings, and written submissions from members of the public and counsel responding to or regarding Verizon’s application.

- B. **Applicable Legal Standards.** While acknowledging that its proposed installation of SWF poles along Ocean Avenue violates the Borough Code (and, in particular violates Section 330-72(H)(5), which provides, “No poles, Cabinets or similar facilities may be placed within 150 feet of the beach ... or Ocean Avenue”), Verizon asserts that the Borough must waive the Code because, according to Verizon, the Code prohibits or has the effect of prohibiting Verizon’s provision of wireless services in the Borough. Verizon maintains that the Code is pre-empted by the federal Telecommunications Act of 1996, as that Act has

been interpreted by the Federal Communications Commission. The legal standards that apply to and govern Verizon's claim of pre-emption are as follows:

1. **Key Provisions of the Telecommunications Act.** 42 U.S.C. §332(c)(7) contains two provisions that bear directly on Verizon's application. First, Section 332(c)(7)(A), titled "General Authority," provides:

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless facilities.

Immediately following, Section 332(c)(7)(B), title "Limitations," provides:

The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Second, 47 U.S.C. §253 similarly provides as follows:

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

...

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The basic question raised by Verizon's application is whether the Borough Code and the Borough's management of the public rights-of-way "prohibits or has the effect of

prohibiting the provision of personal wireless services,” as that term is used in the Telecommunications Act, or whether the Borough Code constitutes a valid exercise of police powers reserved to State and local governments under that Act, because it does not prohibit or amount to a prohibition of personal wireless services.

2. **Reserved Police Powers.** The Supreme Court of the United States has stated that Section 332(c)(7)(A) “makes clear that, other than the enumerated limitations imposed on local governments by the statute itself, ‘nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.’” *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 303 (2015).
3. **Federal Communications Commission (“FCC”) Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018).** In this Declaratory Ruling (hereafter, the “Small Cell Order”) the FCC construed Section 332(c)(7) – and, in particular, the “prohibit or have the effect of prohibiting” language of Sections 332(c)(7)(B) and 253(a) – and determined that state and local regulations that “materially inhibit” the provision of wireless services constitute an impermissible “prohibition” under that section. This standard has come to be known as and will be referred to hereafter as the “materially inhibits” standard. The FCC, in adopting that standard, expressly acknowledged that, in several provisions of the Telecommunications Act, including 332(c)(7), Congress “affirmatively protected the ability of state and local governments to carry out their responsibilities for maintaining, managing, and regulating the use of ROW and structures therein for the benefit of the public.” *Id.* at 9138, n.272; *see also, id.* at 9103, n. 83 (recognizing that states and local governments may “dispose of applications relating to the matters subject to Section 332(c)(7) in any manner they deem appropriate, so long as that conduct does not amount to a prohibition or effective prohibition, as interpreted in this Declaratory Ruling...).
4. *City of Portland v. United States*, 969 F. 3d 1020 (9th Cir. 2020). In the *City of Portland* case, the court reviewed and upheld much of the Small Cell Order but vacated

that part of it dealing with aesthetics. The court held that local governments retain authority to impose aesthetic requirements on SWFs so long as local government requirements do not unreasonably discriminate against providers of functionally equivalent services. The Court also noted, citing the legislative history of Section 332, that the location of wireless facilities in one part of town does not mandate that they be approved in other parts of town. “See S. Rep. No. 104-230, at 208 (1996) (Conf. Rep.) (“For example, the conferees do not intend that if a state or local government grants a permit in a commercial district, it must also grant a permit for a competitor’s 50-foot tower in a residential district.”)” 969 F.3d at 1041. The Borough is cognizant that, while it retains significant land use discretion to address aesthetics, its requirements must be reasonable. *Id.*

5. ***Cellco P’ship v. White Deer Twp. Zoning Hearing Bd.*, 74 F.4th 96, 100, 103 (3d Cir. 2023).** In the *White Deer Twp.* case, the United States Court of Appeals for the Third Circuit adopted the FCC’s “materially inhibits” standard, while also recognizing that, in enacting the Telecommunications Act of 1996, Congress preserved the traditional authority of local governments over the placement, construction, and modification of personal wireless services.
6. **“Materially Inhibits” Standard.** The Borough recognizes that, to date, the FCC’s Small Cell Order and the “materially inhibits” standard that it adopts have been judicially reviewed under the *Chewron* standard of deference and recognizes further that the Supreme Court’s opinion in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), calls into question whether such deference remains legally warranted. Nonetheless, in addressing Verizon’s application, the Borough has accepted and applied the “materially inhibits” standard, as construed and modified in the *Portland* case, just as the Borough did in adopting Chapter 330, Article VII, of the Borough Code.
7. **Borough of Spring Lake Municipal Code, Chapter 330, Article VII.** The Borough’s Code provisions governing siting of SWFs is the framework within which the Verizon application must be viewed, and based upon the Findings contained

herein, those provisions do not materially inhibit Verizon's ability to provide wireless services.

8. **Burden of Proof.** Since TCA Section 332 preserves local regulatory authority with respect to wireless siting, and TCA Section 253 preserves local authority to manage the rights-of-way, while also applying certain limitations, the burden of proof is on an applicant seeking a local permit or waiver or variance or the like to establish an entitlement to it. Here, since Verizon has acknowledged that its proposed placement of SWF poles on Ocean Avenue violates the Borough Code, the burden of proof is on Verizon to demonstrate that federal law, by force of pre-emption, compels the Borough to waive the Code. Case law applying the "materially inhibits" standard does not yet clearly define the factors that a wireless provider must prove in order to establish an "effective prohibition" under that standard, *see, TowerNorth Development, LLC v. City of Geneva*, 2024 WL 621616 (N.D. Ill. 2024), WL Op. at *25 ("Apart from *Cellco Partnership*, there is little case law addressing the 'materially inhibits' standard"), but, of necessity and at a minimum, a provider should have to show that any asserted "inhibition" is truly "material" to its provision of wireless services, and not a minor, surmountable inconvenience or constraint. To constitute a "material inhibition," compliance with local ordinances must present a substantial impediment to the provision of adequate coverage. The Borough finds that Verizon has not met that burden and finds, based on substantial evidence in the record as specified in this Resolution, that the Borough Code does not "materially inhibit" Verizon's provision of wireless services.

- C. **Preliminary.** The Borough finds that the facts recited in the above "Whereas" clauses are accurate and supported by the record and each Whereas clause is hereby repeated by incorporation and included as a specific factual finding.

- D. **Specific Factors Influencing the Timing of These Proceedings**

1. Spring Lake's unspoiled beachfront is a defining feature of the Borough and the County and is a fragile asset of irreplaceable value. The tranquility and aesthetics of Ocean Avenue distinguish the Borough from neighboring shore communities, and the lack of commercialism is a major reason the Borough ranks among the "best places to live" in the entire country. The Borough Code recognizes that the lack of commercial development on Ocean Avenue is key to the Borough's desirability and enjoyability, and seeks to preserve it for the benefit and welfare of all Borough residents and, indeed, for all New Jerseyans.

2. The recognition of the importance of preserving the beachfront was included in the Borough's adoption of its code provisions regulating SWFs in public rights of way. The preamble to that Code provision notes, among other things:
 - a. N.J. Admin. Code § 7:7-16.10 provides that new coastal development must be visually compatible with its surroundings including existing scenic resources, site design, and size, and must contain design elements which enhance public access to the waterfront.
 - b. The Borough has a specific obligation to its residents and visitors to protect its unique beachfront, related vistas and the highly unique passive recreational opportunities it affords to both.
 - c. Erecting New Poles and Ground level Cabinets in the Municipal Right-of-Way raise significant aesthetic and safety concerns and those concerns are especially pronounced along the beachfront as specifically regulated by Ch. 114 of the Borough code.
 - d. The Borough's beachfront, boardwalk and adjacent areas are part of the Coastal Zone designated the New Jersey Coastal Area Facility Review Act and other laws that recognize and regulate such areas as a highly unique and valuable resource.

3. While the Borough Council is dedicated to preserving the beauty of the Borough's beachfront and to protecting the environmentally sensitive nature of Ocean Avenue, the Council also recognizes that, in the field of telecommunications, FCC regulations limit certain aspects of local authority and the Council has sought, carefully and in good faith,

to ensure that its handling of Verizon's application comports in all respects with federal law.

4. To that end, upon receiving Verizon's application, the Borough Council created a 5G Committee comprised of elected officials and Borough staff, and tasked it with developing an understanding of the interactions of federal, state and local law as they bear upon the application. Prominent among the 5G Committee's delegated tasks was the engagement of a legal professional versed in this specialized field to advise the Council before any final decision on the application was made. Of necessity, a central focus of the 5G Committee's work was to ascertain whether viable alternatives exist to Verizon's proposed placement of SWF poles on Ocean Avenue.
5. In mid-March 2024, at the recommendation of the 5G Committee, the Borough retained the services of Kenneth Fellman, Esq., of the law firm Wilson Williams Fellman Dittman of Louisville, Colorado. Mr. Fellman has years of experience in working with local governments on wireless siting issues and addressing the federal statutes and regulations impacting local governments, including advocacy at the FCC on many of the issues that are the subject of Verizon's application.
6. In April 2024, after engaging Mr. Fellman and guided by his advice, the Borough sought supplemental information from Verizon addressing technical engineering and radio frequency emissions issues. That information was requested because a review of Verizon's application demonstrated that significant information needed to evaluate the application was missing from it or not fully explained. More than two months later, on July 15, 2024, Verizon submitted supplemental information from its engineering experts.
7. Mr. Fellman and the 5G Committee diligently reviewed the supplemental information over the next month.
8. Concurrently, the 5G Committee and Borough staff explored potential alternatives to Verizon's proposed placement of SWF poles along Ocean Avenue, including, as will be

discussed in more detail later in this Resolution, the possible use of two pavilions that the Borough owns adjacent to Ocean Avenue on the north and south ends of the Borough (referred to hereafter as “the pavilions”).

9. After reviewing the information in the initial application and the supplemental submissions, including the new information provided by Verizon in mid-August, the Borough Council determined that formal notice of Verizon’s application should be given to its residents and an opportunity provided for public comment at a scheduled public meeting. To that end, the Council also made the application itself available to the public, for review and comment. The Council’s determination to afford the public an opportunity for review and comment was reasonable and well-warranted in view of the impact that the placement of SWF poles along Ocean Avenue would have on the community, and was consistent with New Jersey’s established public policy favoring open government.

10. The Borough Council scheduled a public meeting on the first available date: September 24, 2024.

11. The public meeting of September 24, 2024, took place as scheduled. At it, numerous residents, including residents represented by private counsel, expressed a desire to provide the Council with written submissions for inclusion in the record of decision. The Council determined that a reasonable opportunity should be afforded for such submissions to be made. Verizon attended the meeting and chose not to provide any testimony.

12. On September 27 and 30, as well as on October 4 and 7, 2024, Verizon again supplemented its application. Naturally, the Borough required time to review that new Verizon information as well as review the additional filings from residents after the September 24th public meeting.

13. The Borough asked Verizon to extend the shot clock in an email message from counsel on September 30, 2024, and again in a letter from counsel dated October 9, 2024. Despite its own submission of supplemental materials between September 27 and October 7, and despite the Borough's provision to Verizon of other extenuating medical and personal circumstances involving the Borough's Mayor, staff and counsel, Verizon summarily rejected each request.
14. Following Verizon's rejection of the Borough's request for an extension of the shot clock, the Borough moved forward with the scheduling and holding of a second public meeting on November 12, 2024, at the completion of which the Council closed the record.
15. The Borough finds that, under all the circumstances and given the unique facts of this application, it has not acted with any unreasonable delay but rather has acted with diligence, reasonable dispatch, and in accordance with the public's right to notice and an opportunity to be heard on a matter of profound local importance. The Borough merely took the time needed to review and carefully consider all of the information submitted into the record by Verizon and its concerned residents.
16. The Borough finds further that any asserted delay on its part in the evaluation and disposition of Verizon's application was partially caused by Verizon's failure to timely file requested information and its late filing of other information. Most of all, any asserted delay on the Borough's part is of no possible prejudice to Verizon. To the contrary, the Borough has repeatedly pointed out to Verizon that no SWF poles can be placed on Ocean Avenue without County approval (a point of law that Verizon has never contested and cannot reasonably contest), and has pointed out, further, that Verizon has not yet even begun the process for obtaining County approval. As well, Verizon has not completed its NEPA review process, and as represented by its counsel, was planning to begin that process for four (4) of the six (6) sites at issue in the application during the first week of November.

17. Verizon's application presents complex technical issues, complex legal issues, and issues of profound local importance to all Borough residents. As Verizon's submittal of serial supplements to its application well reflects, the issues presented are difficult even for an entity as familiar with such applications as Verizon itself. Although this Resolution post-dates Verizon's declared expiration of the "shot clock," the Borough disagrees with Verizon's calculation of the statutory "reasonable time period," and finds that, under the unique factors of Verizon's application, it has acted with reasonable dispatch.

E. **Alternatives to Address Verizon's Network Issues**

1. Verizon notes in its application that "over the summer months" and, according to its network engineer, "particularly on summer weekends and holidays" there is a significant increase in demand, and it asserts that its current network is insufficient to meet that demand, and that this seasonal insufficiency inhibits the ability of residents and visitors to make and receive phone calls or text messages or use their devices to access the internet.
2. In furtherance of its review of Verizon's application, the Borough has asked Verizon to consider possible alternatives to addressing its network concerns that do not involve locating SWF poles on Ocean Avenue in violation of the Borough Code. Those alternatives include (1) locating SWF poles on the side streets that run west from Ocean Avenue, (2) possible roof-top space on one or more of the several historic multi-story buildings along Ocean Avenue, (3) use of temporary facilities known as Cells on Wheels ("COWs") during the summer months, (4) adding new antennae and related facilities to the two existing macro sites where Verizon network equipment is currently located, and (5) potential use of one or both of the pavilions that are located on the beach on the north and sides of the Borough, adjacent to Ocean Avenue.
3. Regarding the possible location of SWF poles on side streets, Verizon claims, and in support, has submitted a report from a network engineer, dBm Engineering, P.C., that the physical structures located in between the utility poles where its SWFs might be sited and the beach would block the line of sight that is required for 5G small cell service, and has

rejected this option. Verizon has not provided any information, however, addressing additional height requirements that would be needed to create a better line of site from these side street locations. In other words, Verizon has not addressed the possibility that its coverage needs can be met with taller facilities on side streets that would avoid the need to site SWFs on Ocean Avenue.

4. Regarding the potential use of roof-top space on the several multi-story buildings along Ocean Avenue, Verizon has asserted that the owners of these structures are not willing to allow Verizon to locate Verizon's network facilities on their properties, but has provided no evidence of any attempts to negotiate with the owners to obtain their permission.
5. Regarding the use of COWs, Verizon has successfully used COWs in the past on weekends where special events (e.g., organized races) have attracted large crowds to the beach in Spring Lake. The Borough has reminded Verizon of that history and Verizon has provided no reason why COWs cannot be an alternative to the placement of SWF poles on Ocean Avenue in violation of the Borough Code. The Borough has made clear it is willing to discuss the use of these temporary facilities at appropriate locations to provide Verizon the ability to meet its claimed network demands "during the summer months." Verizon has rejected this suggestion without explanation.
6. Verizon currently utilizes two macro tower sites for its network coverage in the Borough, on which it already has existing antennas and related wireless network facilities to provide wireless service throughout the Borough. One facility is a lattice tower located at 1731 Main Street in Lake Como, and the other facility is a water tower located at 501 5th Avenue in Spring Lake. Regarding the possibility that Verizon could gain new network capacity by upgrading and possibly adding new antennas to these two macro tower sites, the Borough notes that residents opposing the Verizon application ("Opponents") have joined together, obtained legal counsel, and have submitted a report from an RF engineering expert, Kent A. Chamberlain, Ph.D., who has opined that such an upgrade or expansion of the existing sites is technically feasible. Dr. Chamberlain concludes in his report that, if Verizon has licenses for the appropriate frequencies, these two sites appear

to have sufficient capacity to add new antenna and related facilities. Dr. Chamberlain notes that C-Band 5G capability could be part of the Verizon deployment at these sites. He additionally notes that the frequencies of C-Band would provide favorable propagation characteristics and would reach enough users to increase overall capacity.

7. Verizon was provided with a copy of Dr. Chamberlain's report and was offered an opportunity to respond to it. Verizon did not avail itself of that opportunity. The Chamberlain report thus stands unrebutted and, factually speaking, uncontroverted.
8. Regarding the possible use of the pavilions, Verizon has acknowledged that the placement of SWFs on the pavilions would provide the increased network capacity that it is seeking. Verizon has rejected the potential use of these structures, however, because they are located on parcels that are included in the Borough's Recreation and Open Space Inventory ("ROSI"). Verizon maintains that, without a waiver, State regulations would prohibit the use of these structures for the siting of commercial wireless facilities.
9. Based on Verizon's refusal to explore the possible use of the pavilions as an alternative to the placement of SWF poles on Ocean Avenue, the Borough has researched the process of applying for and obtaining a waiver from the New Jersey Department of Environmental Protection ("DEP") to allow the placement of SWFs on these structures. That research has indicated that the pavilions are a viable alternative to Verizon's proposed placement of SWF poles on Ocean Avenue.
10. Significantly, wireless facilities (albeit non-commercial ones) are already located on the pavilions. Thus, in seeking a waiver from DEP, the Borough could accurately represent to DEP that the placement of SWFs on the pavilions is consistent with their existing status and use, and would, as an additional major environmental benefit, prevent Verizon's proposed degradation of the Borough's unspoiled beachfront. Although Verizon has expressed concern about the length of time approval might take (a concern that can be practicably addressed through the interim use of COWs), and the outcome of a waiver request cannot be predicted with certainty, Verizon has offered no persuasive

reason to think that DEP would reject or balk at such a reasonable, publicly beneficial waiver request; no such reason exists.

11. Beyond that, in communicating with DEP about the ROSI waiver process and the possible siting of SWFs on the pavilions, the Borough has learned that DEP is in the process of rewriting its rules, and the expectation is that the new rules will permit this kind of use as ancillary to the primary recreational uses of the property. The Borough has been advised that DEP's expectation is that the new rules will be effective by November 2025. Verizon cannot reasonably assert that the use of COWs is a non-viable alternative for bridging that small temporal gap.
12. The Borough has solicited Verizon's participation and assistance in working with DEP both in the pursuance of a ROSI waiver and adoption of publicly beneficial changes to the DEP rules. The Borough specifically offered to approve the use of one or more COWs during the summer of 2025 to address any immediate network capacity concerns so that the potential use of the pavilions, either by waiver or rule change, could be jointly pursued in good faith. The Borough also noted that if, for some unforeseen reason, the pavilions remained unavailable as an alternative solution, Verizon could of course re-file its current application. Verizon refused all the Borough's requests for cooperation and assistance and instead insisted that the Borough proceed to a decision on its pending applications.
13. Verizon's unwillingness to pursue a viable alternative in cooperation with the Borough was underscored on November 8, 2024, when Verizon filed suit against the Borough. The Borough has made known to Verizon that the Borough intends to pursue a ROSI waiver from DEP and Verizon has, for its own reasons, insisted that the Borough render a decision on its application to place SWF poles on Ocean Avenue.

F. **Request for Waivers of Borough Code Provisions**

1. Verizon's application calls for SWF poles to be placed in the right-of-way of Ocean Avenue, which, for the reasons noted above in the adoption of the ordinance governing siting of SWFs in the rights-of-way, is prohibited by the Borough Code.
2. Verizon claims that, due to a lack of viable alternatives, it requires these sites and that enforcement of the prohibition of SWF poles on Ocean Avenue would materially inhibit its ability to provide wireless services, in violation of federal law. As a result, Verizon's application claims that these code prohibitions are preempted and unenforceable.
3. In addition to its reports in the record from dBm Engineering, P.C., Verizon's application included a letter from Scherer Design Group, LLC, a telecommunications engineering firm which stated that a waiver of the Borough's requirement for poles to be located a maximum of 18" behind the curb line is required because Monmouth County's requirement for poles (per Section 5.3-12 of the Monmouth County Development Regulations, Volume II) is that they be no closer than 6' from the curb line. While Verizon seeks a waiver of the Borough Code requirements on this issue, Verizon has *not* sought a waiver from the County of its curb setback requirements, nor did it or any of its engineering experts provide any cogent reason why the Borough should waive its setback requirements, as opposed to the County waiving its requirements.
4. The dBm Engineering letter additionally claimed that moving SWF poles 150 feet west would significantly limit coverage at the beach. The engineer did not address coverage that could be achieved if the poles were moved to the side streets or a shorter distance of 150 feet west. Nor did the engineer address the coverage that could be achieved by moving 150 feet west and increasing the height of poles so as to avoid impacting line of sight issues.
5. In a subsequent letter from dBm Engineering dated July 11, 2024, there was a similar description of reduced coverage if the SWF poles are moved west of Ocean Avenue. As with the information from dBm that Verizon submitted with the application, the July 11,

2024 letter did not address whether adequate coverage could be obtained if the height of SWF poles located west of Ocean Avenue were increased.

6. dBm Engineering also referenced the existing macro tower sites used by Verizon to serve its subscribers in the Borough, but did not address the possibility replacing the existing equipment with upgraded equipment or placing additional facilities on either of those two sites. Again, in the subsequent July 11th letter, dBm does not address whether coverage could be obtained by adding more SWFs at the westerly macro tower sites.
7. The Verizon application also acknowledges that, by seeking to install SWF poles with heights approaching forty-five (45) feet, Verizon is proposing to exceed the Borough's height limits of 35 feet or 110% of the height of poles in the surrounding streetscape, whichever is higher. *See*, Section 330-72(B) of the Borough Code. Verizon asserts that these heights are necessary to provide sufficient network coverage and to accommodate collocation of other users.
8. The Borough notes that, pursuant to a regulation adopted by the FCC in 2020, changes in wireless structures that do not exceed an increase of ten percent (10%) must be approved and shall not be denied. In other words, the Borough would have no discretion if, in the future, Verizon applied to increase the height of the poles by approximately 4 ½ feet, making 44-foot poles 48-49 foot poles.
9. In support of its application to place poles housing SWF poles in locations prohibited by the Borough Code, Verizon states in its application that existing capacity problems have "inhibited the ability of residents and visitors to make and receive phone calls or text messages or use their devices to access the internet." While Verizon has submitted evidence of usage of its network during high traffic weekends in the summer, it has submitted no evidence that any resident or visitor has been unable to make or receive calls or text messages or use their devices to access the internet during these time periods. To the contrary, evidence in the record from numerous citizens indicates a lack of documented problems with or complaints about Verizon's services within the Borough.

10. The Borough also finds, consistent with federal law requirements that it not discriminate in the application of its regulations on providers of functionally equivalent services, that if waivers are granted allowing Verizon to install SWFs and SWF poles on Ocean Avenue contrary to long-standing Borough practice and policy, there are other wireless companies that compete with and provide comparable services as Verizon. If the Borough were to grant these waivers, especially in light of the fact that other reasonable alternatives exist, multiple other entities would have to be granted similar waivers to place their facilities on Ocean Avenue, leading to the destruction of the beauty and non-commercial nature of Ocean Avenue, and would further end any future opportunity to regain and preserve the unspoiled ecological nature of this part of the Borough.
11. Finally , the Borough notes that a letter submitted by the Opponents from Anderson Engineering dated October 9, 2024 claims that the service entrance conductors that Verizon proposes to use on the SWF poles are inconsistent with the requirements of the 2020 National Electric Code (“NEC”). Verizon was provided a copy of this report and encouraged to provide any relevant material in rebuttal, but chose not to do so. The evidence therefore is uncontroverted that the SWFs that Verizon proposes to install are noncompliant with the NEC.

G. Impact Upon Property Values

1. Numerous citizens testified either in person or in letters in the record indicating that locating SWF poles on Ocean Avenue at heights up to forty-five (45) feet will reduce their property values. Opponents have retained a reputable appraisal firm, Federal Appraisal, LLC, to evaluate and opine on the market-value impact the proposed SWF poles that are the subject of Verizon’s application will have on five (5) specific properties located on Ocean Avenue, which are accurately described in the report as luxury beach homes with highly valued views of the Atlantic Ocean.

2. The Federal Appraisal report notes other studies finding that cell towers in proximity to residential properties can cause a reduction in market value of between two (2) and thirty-five (35) percent. These earlier studies appear to have addressed the impacts on property values caused by macro tower sites (not SWF poles), and Verizon was provided with a copy of the Federal Appraisal report. It has not provided, or sought to provide, any countervailing report. Expert opinions aside, common sense suggests that the proposed placement of SWF poles on Ocean Avenue would have a marked negative effect on the market value of nearby properties.
3. With respect to the five (5) properties that were the subject of the Federal Appraisal study, the report concluded that there would be a reduction of property value of three percent (3%) amounting to a reduction of property value of \$1,262,924.00 for those properties alone. The report noted that there are other residential properties within 1,000 feet of the proposed SWFs and those properties would be similarly impacted.
4. The Borough finds that the Federal Appraisal report is credible and that it supports the conclusion that Verizon's proposed placement of SWF poles on Ocean Avenue would have a negative effect on the market value of nearby properties. The Borough finds further that Verizon's failure to provide any evidence rebutting the Federal Appraisal report reflects and confirms the basic soundness of the report.
5. The Borough additionally finds that since its own revenues are generated in large part from property taxes, significant reductions in property values will negatively impact the Borough's revenues and budget, and its ability to provide the services it delivers to its residents, businesses and visitors.
6. The Borough finds that the consideration of the impact SWFs will have on property values is a legally appropriate issue to consider in determining whether to approve or deny a siting application. *See, Cellular Telephone Co. v. Zoning Bd of Adjustment*, 197 F.3d 64 (3rd Cir. 1999).

H. Needed Authorization from the County

1. Since Ocean Avenue is a County road, Verizon cannot place any SWF poles within the Ocean Avenue right-of-way without authorization from the County. Verizon clearly recognizes the need for County approval as it has submitted two applications to the County for such approval, both of which have been rejected by the County for incompleteness.
2. Verizon is also aware of the need for County approval from a litigation pending in the United States District Court for the District of New Jersey, in which Verizon is presently involved, entitled *Cellco Partnership and New York SMSA Limited Partnership, both D/B/A Verizon Wireless v. County of Monmouth, et al.*, Docket No. 1:23-cv-180991-ESK-EAP. That action arises out of Verizon's attempt to place SWF poles on Ocean Avenue in the adjoining municipality of Belmar. It is a matter of public record that, in that suit, the County has opposed and is currently opposing that attempt. Verizon is aware, from the Belmar suit, that Ocean Avenue is within the County's jurisdiction and that any installation of SWF poles in this right-of-way requires County approval.
3. Verizon filed an application with the County to locate SWF poles on Ocean Avenue in the Borough on May 10, 2023, which application was rejected by the County as insufficient on August 8, 2023.
4. Over a year passed before Verizon re-filed its application with the County on September 18, 2024. That application too was found to be insufficient and rejected by the County on October 4, 2024.
5. As of this date, Verizon does not have a pending application with the County seeking permission to locate SWF poles on Ocean Avenue within the Borough. Nor, at this juncture, does it appear that County approval of any placement of SWF poles on Ocean Avenue is imminent or likely. To the contrary, at the September 24 public meeting, County Commissioner Arnone addressed the Mayor and Council and stated

unequivocally that the County is opposed to any such installation. Thus, the lack of County approval is not some mere formality that Verizon can readily overcome once the Borough takes its action on the Verizon application. It is a key missing ingredient of Verizon's application that renders the entire application an artificial and premature exercise – one that also renders its lawsuit against the Borough (discussed *infra*) unripe and unproductive.

6. It bears noting that the Borough has suggested to Verizon that, from a practical standpoint, it only makes sense for Verizon's application to the Borough to be considered concurrently with its application to the County, to avoid the obvious potential for conflicting decisions. To take just one example, Verizon acknowledges in its application to the Borough that its proposed placement of SWF poles on Ocean Avenue would violate the Borough Code regarding required distance from the curb (hence Verizon's need for a waiver of that provision), and has noted, in support of that request for a waiver, that the Borough Code requirements differ from the County's distance requirements. Verizon has provided no analysis of whether the public interest would be better served by adherence to the County's or the Borough's distance requirements but plainly this is an issue that requires County and Borough coordination and consultation. Despite that, Verizon has steadfastly refused to pursue its applications to the Borough and the County concurrently.
7. At this time, regardless of any decision the Borough might make on Verizon's application, Verizon has no authority to construct anything on that part of Ocean Avenue within the jurisdiction of the County and has no pending application to the County seeking such permission. Without County authority, Verizon's application is a pointless, inefficient imposition on the Borough's staff and resources.

I. **Uncompleted NEPA Review Process**

1. In its application to the Borough, Verizon made no reference to compliance with NEPA, nor did it provide any description of its plan to obtain NEPA approval for the sites at issue here. Again, Verizon appears to have pursued a deliberate course of piecemeal

applications, without advising the Borough of other open regulatory issues bearing on the application.

2. The Borough first became aware of Verizon's uncompleted attempts to fulfill NEPA requirements, when a newspaper advertisement appeared in the Coast Star on or about October 28, 2024, inviting interested persons to file comments on a planned SWF and SWF pole application along Ocean Avenue in Spring Lake. After review of that advertisement, the Borough's outside counsel contacted Verizon's counsel for more information.
3. Later that same day on October 28, 2024, Verizon's counsel responded that Verizon's regulatory team "has started to do their NEPA review—this is part of that." He further noted that these processes are undertaken one site at a time. In subsequent communications Verizon's counsel indicated that the site labeled JS Spring Lake 01 SC - B was determined not to require further NEPA review on March 15, 2024, that a second site was now in a 30-day public comment period, and that the process for the remaining four (4) sites would be commenced at some point in the near future.
4. At present, the Borough only has information that one (1) of the six (6) sites has completed NEPA review. Depending upon the findings of the NEPA review process, conditions could be identified that would need to be taken into consideration, and which could have substantive impacts on how the Borough addresses the application.

J. SQF, LLC's Ownership of the SWF Poles

1. Verizon's application states that it will own the antennas and related SWFs, but that a separate, unrelated entity, SQF, LLC, will own all of the poles in the rights-of-way upon which the SWFs will be attached; Verizon states in its application that Verizon "shall market the availability of its approved SWFs to all major wireless carriers in the marketplace and will encourage, manage and coordinate the location and placement of any interested carrier's equipment on said SWFs."

2. While SQF is not an applicant or a co-signer of Verizon's application, the application does include a "Certification of SQF" wherein SQF's Secretary, Timothy Schneider, states that SQF will own five (5) of the six (6) poles that are the subject of the application and that SQF will market the availability of these poles to other wireless carriers and will manage the attachments to these poles.
3. The Verizon application therefore contains conflicting assertions regarding ownership of the subject poles, and the responsibility for managing use of these poles in the rights of way within the Borough.
4. The Borough Code, particularly Chapter 330, Article VII, applies to "Utilities" seeking access to rights-of-way within the Borough, and defines Utilities as entities regulated by New Jersey's Board of Public Utilities ("BPU"). SQF is listed on BPU's website as an entity that the BPU has authorized to provide service within New Jersey utilizing their own facilities, which brings it under the purview of the Borough's Code.
5. The Borough Code, Section 330-70, also requires that any owner of facilities in the rights-of-way enter into a rights-of-way agreement with the Borough. Verizon's application proposes a rights-of-way agreement between the Borough and Verizon, and applies to SWFs owned by Verizon and located in the rights-of-way.
6. Given that SQF is not an applicant and that SQF is not proposed to be a party to Verizon's proposed rights-of-way agreement, none of Verizon's obligations to the Borough under the proposed rights-of-way agreement would apply to SQF's poles. While that deficiency in Verizon's application is potentially curable, it is fatal to the application as presented.

K. Other Provisions of the Borough Code

1. As noted above, a number of Spring Lake residents have joined together and retained legal counsel to oppose Verizon's application. Among other objections, these Opponents

claim that Chapter 330, Article VII is not the only applicable Chapter of the Code that must be considered and that the application should be denied for failure to comply with other provisions of the Borough Code.

2. Opponents claim that Section 114-26 of the Code prohibits the location of Verizon's SWF poles within the dedicated beachfront or public walk on the beachfront. This section is titled "Peddling or Vending" and states that "No person or persons shall peddle, vend, sell, distribute or offer for sale any goods, wares or merchandise on the dedicated beachfront or the public walk on the dedicated beachfront." The opponents claim that Verizon's services are "wares" and that the Code prohibits Verizon from "delivering" these "wares" on the beach.
3. The Borough finds that this provision of the Code does not, by its express terms, apply to or prohibit Verizon's proposed placement of SWF poles on Ocean Avenue. Therefore, Opponents' reliance on Section 114 is misplaced. Importantly, Section 114-26 does reflect the Borough's commitment to maintaining an uncommercialized and unspoiled beachfront and does underscore the common-sense need to consider alternatives to the placement of SWF poles on Ocean Avenue before degrading the beachfront with industrial clutter. As addressed above, Verizon has failed to demonstrate that viable alternatives do not exist.
4. Opponents also claim that Chapter 225, the Borough's Land Development Code, is applicable to Verizon's application, and assert that Verizon has failed to comply with it. Where it applies, Chapter 225 requires land use applications to be heard and decided by the Borough's Planning Board and addressed as applications for conditional use approval. Opponents also assert that State Law requires that conditional use requests be considered and acted upon by the Planning Board.
5. Opponents do not cite any case or administrative precedent that supports their interpretation of Chapter 225, and the Borough has been unable to find any such precedent. This appears to be a novel legal issue. On balance and review, the Borough

does not agree with Opponents' contention that Verizon's application must be reviewed and approved by the Planning Board, but the Borough acknowledges the closeness of the question and the existence of reasonable arguments for and against Planning Board review.

6. For clarity of the record, the Borough notes that Section 225-33 contains definitions of Telecommunications or Transmission Towers, Monopoles, Lattice Towers and Guyed Towers – all of which do require Planning Board review and approval. The proposed SWF poles here at issue do not, by the Borough's reading, fall or fit within those definitions. The Borough further finds that SWF poles are comparable to utility poles and traffic signal poles, are close enough to be regulated similarly.

II. CONCLUSIONS

Based upon the evidence contained in the written record of this proceeding, the Borough concludes as follows:

A. SHOT CLOCK AND TIMING OF THE BOROUGH'S DECISION

1. The Borough denies the assertions made in Verizon's recently filed federal court complaint claiming that the Borough "effectively denied" Verizon's application because it unreasonably delayed deciding on the application and failed to render a decision prior to the expiration of the shot clock (as Verizon calculates it). At the time the action was filed, the Borough was concluding its review of Verizon's application, as Verizon had been informed and knew, and was doing so with reasonable dispatch under the circumstances.
2. The Borough finds that, at all times since the filing of its application, Verizon has known that the Borough was evaluating the information contained in the application in good faith, was pursuing needed information that was *not* contained in the application and proceeding with reasonable and appropriate deliberation towards a final decision.

3. The Borough finds that the initial application lacked sufficient information needed to evaluate it. Verizon itself bears significant responsibility for the length of time it has taken for the Borough to render a decision on the application. Verizon took over two months to submit necessary technical information omitted from its initial application, which information was not provided until mid-July, and made four (4) additional submissions into the record in late September and early October.
4. In light of Verizon's failure to file and pursue a necessary application with Monmouth County, any asserted delay by the Borough in acting on Verizon's application is of no practical consequence and of no possible prejudice to Verizon.
5. Likewise, Verizon's failure to complete its required NEPA evaluation of all sites – and its failure even to begin that process for most of the sites at issue until November – makes Verizon's demand for a final decision by October 15, 2024 unreasonable. The ongoing NEPA review may impact the material terms of the application. The Borough should have been given the final NEPA results for each site before being asked to make a final decision.
6. Under all of the circumstances described herein, the time taken by the Borough to render a decision on Verizon's application was and is reasonable and does not violate federal regulations related to the FCC's shot clock.

B. ALTERNATIVES TO OCEAN AVENUE SITES

1. The Borough finds that other alternatives that would have far less of a negative impact on the Borough and its citizens, were not adequately considered or addressed by Verizon.
2. The Borough finds that Verizon did not sufficiently explore the possibility of locating SWF poles on the side streets that run perpendicular to Ocean Avenue at greater heights in order to maintain line of site to the beachfront.

3. The Borough finds that Verizon did not sufficiently explore the possible use of COWs on weekends during the summer months as a viable alternative to the permanent placement of SWF poles on Ocean Avenue. Verizon provided no such justification for its refusal to consider this option, which could very practicably serve as a bridge to a less deleterious alternative such as the use of the pavilions or the upgrading of existing macro towers.
4. The Borough finds, based on credible and un rebutted evidence in the written record, that Verizon could address its capacity needs by adding additional wireless facilities to the two macro tower sites that it currently uses to provide network coverage within the Borough or upgrading the equipment on those towers. Verizon had notice of the evidence in the record regarding that practicable alternative and provided no countervailing evidence.
5. The Borough finds that Verizon has unreasonably rejected the potential use of the pavilions as an alternative to the placement of permanent SWF poles on Ocean Avenue. The Borough finds further that Verizon unreasonably failed to cooperate with the Borough in the Borough's outreach to DEP for guidance on this alternative, which outreach has demonstrated that the use of the pavilions is a viable and practical alternative to Verizon's proposed placement of permanent SWF poles on Ocean Avenue. The information provided to the Borough by DEP indicates that a request for a ROSI waiver would likely meet with approval and that such a request may not even prove necessary because the rules that currently require a ROSI waiver are being rewritten and are expected to be amended (in a fashion that would allow the use of the pavilions) by November 2025. Given that Verizon could easily increase network capacity on the beachfront using COWs during the busier summer months in 2025 while these rule changes are implemented, especially when Verizon still has no pending application at the County and has not completed the bulk of its NEPA review process, the Borough finds that Verizon's refusal to work with the Borough to pursue the pavilions as an option was unreasonable.

6. The Borough, by this Resolution, also memorializes its intention to apply for a ROSI waiver to allow SWFs to be placed on the pavilions, irrespective of Verizon's lack of cooperation and rejection of the pavilion alternative. The Borough finds that, in light of the likelihood that such a requested waiver will be granted (and the likelihood that the need for a waiver will be mooted by impending rule changes), the pavilions present a viable, practicable alternative to the proposed placement of permanent SWF poles on Ocean Avenue, with far less degradation of and damage to the Borough's crown jewel – its unspoiled beachfront.

7. Finally, the Borough finds that its decision here focusing on protecting the aesthetics of the community, is a reasonable, appropriate and valid legal consideration, and that the decision does not violate FCC regulations. In overturning that part of the FCC Small Cell Order related to aesthetics, the *Portland* case noted that “Congress preempted only [aesthetic] regulations that ‘unreasonably discriminate’ among providers,” and that local governments retain the flexibility to consider aesthetic requirements that treat facilities that create different aesthetic impacts differently. The court further held that “Requirements imposed on 5G technology are not always preempted as unrelated to legitimate aesthetic concerns just because they are “more burdensome” than regulations imposed on functionally equivalent services.” *See, City of Portland v. United States, supra*, 969 F. 3d at 1041.

C. LACK OF EVIDENCE TO SUPPORT WAIVER OF THE BOROUGH CODE

1. Verizon's application acknowledges that the proposed placement of permanent SWF poles on Ocean Avenue, at each proposed site, is contrary to the Borough Code in several separate respects. Verizon maintains, however, that due to a lack of viable alternatives, the Borough Code materially inhibits its ability to provide wireless services and that the Code must, therefore be waived as preempted.

2. There is uncontroverted evidence in the record that as proposed, the Verizon SWF installations will be inconsistent with the requirements of the NEC. The Borough notes

that Verizon was made aware of this claim and chose not to respond to it. The Borough cannot consider granting a waiver of its Code that is noncompliant with applicable safety codes.

3. Under FCC rules, if Verizon's application were granted and the proposed poles placed on Ocean Avenue, under FCC rules mandating that modifications to wireless meeting certain criteria *must* be approved, the height of the SWF poles could be increased in height by 4 ½ feet and the Borough would have no means to stop that from happening.
4. If Verizon is allowed to place SWF poles on Ocean Avenue, the Borough will not only be unable to prevent Verizon from increasing the height of the poles but, more importantly, will have little if any residual ability to deny similar applications by other wireless providers to place their own poles along the beach front. Other wireless providers of functionally equivalent services can claim the exact same entitlement under federal law to override and negate the Borough's efforts to maintain an aesthetically pleasing, pristine beach front. The Borough finds that it has a compelling interest to prevent that from happening, since practicable alternatives other than the placement of SWF poles on Ocean Avenue exist to satisfy Verizon's asserted needs.
5. The Borough finds further that as noted above with references from the *Portland* decision, Congress, in enacting the Telecommunications Act, did not intend to deprive and did not deprive local governmental entities of their well-established police powers to protect unique, irreplaceable environments like the Borough's beach front from degradation and defilement. To the extent Verizon interprets the FCC's "materially inhibits" standard to strip the Borough of those powers, the Borough disagrees and rejects that interpretation.
6. The Borough finds further that any interpretation of the FCC's "materially inhibits" standard as stripping the Borough of its authority to impose aesthetic requirements to protect the unique, irreplaceable environment of its beach front would be contrary to

sound public policy and contrary to Congress's actual intent in enacting the Telecommunications Act.

7. Based on all of the evidence in the record and for the reasons set forth above in this Resolution Verizon has not met its burden of proof with respect to the requested waivers and has failed to provide sufficient evidence to justify those waivers.

D. PROPERTY VALUES

1. Significant evidence was received, both in writing and in testimony at the public meetings, regarding the negative impact that the proposed placement of SWF poles on Ocean Avenue would have on property values in the Borough, especially on properties located on or near Ocean Avenue.
2. The Borough finds that the evidence submitted by the Opponents to Verizon's applications as described above in this Resolution is credible, and comports with common sense and the realities of real estate valuation.
3. The Borough also finds that after receiving copies of the opponents' expert report authored by Federal Appraisal, LLC, as well as other written documentation submitted by various citizens, Verizon submitted no evidence to rebut these submittals.
4. Based on the evidence before it supporting the claims of significant reductions in property values, the Borough finds that the negative impact on property values will in turn negatively impact the Borough's tax revenues and its ability to fund municipal operations.
5. The Borough finds that the issue of impact on property values is a valid, legal factor to consider in determining whether to approve or deny an application such as the one before the Borough at this time. *Cellular Telephone Co. v. Zoning Bd of Adjustment*, 197 F.3d 64, 72-73 (3rd Cir. 1999).

6. The Borough finds that Verizon has not met its burden of proof on the property value issue, and has not proposed any way to mitigate the damage that its proposed sites on Ocean Avenue will cause. The negative impact on property values and the Borough's tax base is another reason why the application should be denied.

E. **NEED FOR MONMOUTH COUNTY APPROVAL**

1. The Borough finds that Verizon's failure to pursue an application with the County for authorization to locate SWF poles within the County's right-of-way is an independent and sufficient ground for denial of the application.
2. After filing an initial application with the County that was rejected as incomplete, Verizon took thirteen (13) months to refile another incomplete application, which was rejected again. Verizon has not pursued its application with the County any further.
3. Each time the Borough has asked Verizon to explain why it was not pursuing its application with the County concurrently with its application to the Borough, Verizon declined to provide a cogent answer and told the Borough, in effect, that Verizon would pursue its County application when it decided it was ready.
4. The Borough finds that the conditions the County might impose or seek to impose on a Verizon application could have a material impact on the Borough's evaluation process and finds further that Verizon's failure to recognize and acknowledge the inextricable intertwining of the two applications is unreasonable. Verizon's failure to pursue concurrent applications negatively impacts its application with the Borough and supports denial of the application without prejudice to re-filing of it at a time when Verizon is prepared and willing to pursue concurrent applications. This is especially so since it is a matter of public record that the County is opposed to the placement of SWF poles within its Ocean Avenue right-of-way.

F. **NEPA REVIEW PROCESS**

1. The Borough finds that Verizon failed to provide any information in its application regarding its obligations under NEPA and the steps needed to determine the applicability of NEPA to the proposed SWF poles that are the subject of Verizon's application. As of this date, Verizon has completed the NEPA review process for only one (1) of the six (6) sites at issue. Verizon's failure to apprise the Borough of its uncompleted NEPA compliance is a material deficiency of its application and the ongoing, uncompleted status of the NEPA compliance process supports denial of Verizon's application, without prejudice to re-filing after the NEPA compliance process is completed.
2. There are a variety of potential outcomes that can emerge from a NEPA review. At present, the possibility exists that for one (1) or more sites an environmental assessment will be required, which could take up to a year to complete. The results of the NEPA process could significantly impact the actions the Borough might take in response to the application.
3. The Borough finds that Verizon should have completed its NEPA review process for each site and provided the Borough the results of that review with its applications. The failure to do so for all proposed sites other than Verizon site JS Spring Lake 01 SC is a basis for denial of the application.

G. **SQF'S OWNERSHIP OF EITHER FIVE OR SIX OF THE POLES THAT ARE SOUGHT TO BE INSTALLED IN PUBLIC RIGHTS OF WAY**

1. SQF is the entity that, according to Verizon, will be the actual owner of at least five of the subject SWF poles. SQF is not an applicant and has not proposed to enter into a rights-of-way agreement with the Borough, as required by the Borough Code. SQF's failure to independently apply or to join Verizon's application as a co-applicant is a fatal flaw in Verizon's application.

2. While Verizon's application contains conflicting information about how many SWF poles SQF will own, it is clear that, at a minimum, SQF will own five (5) of the six (6) poles and there is an expectation that SQF will manage the use of those poles by entities other than Verizon.
3. SQF is a "Utility" with authority to provide services granted by the BPU. As such, SQF is a utility seeking access to rights-of-way within the Borough, and must comply with the requirements of Chapter 330, Article VII. Those requirements include the obligation to apply for authority to use the public rights-of-way and to enter into a Rights-of-Way Agreement with the Borough.
4. The Borough finds that because Verizon will own and/or control only at most, one (1) of the proposed SWF poles and related facilities that are the subject of its application, and because none of Verizon's obligations to the Borough under its proposed Rights-of-Way Agreement would apply to SQF's SWF poles, a necessary party has failed to file an application for permission to install and operate these shared facilities, and the application should and must therefore be denied.

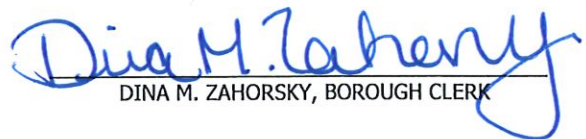
For all of the foregoing reasons and based upon the evidence in the record of this proceeding, the Borough Council of Spring Lake, New Jersey denies Verizon's application for each of the six (6) sites addressed therein.

Adopted and approved on this 3rd day of December, 2024.



MAYOR JENNIFER NAUGHTON

I hereby certify that the above Resolution was duly adopted by the Mayor and Borough Council of the Borough of Spring Lake at a meeting held on December 3, 2024.



DINA M. ZAHORSKY, BOROUGH CLERK

	M O V E D	S E C O N D E D	A Y E S	N A Y S	A B S E N T	A B S T A I N
MR. ERBE			✓			
MR. HALE			✓			
MR. JUDGE	✓		✓			
MISS MCDONOUGH		✓	✓			
MR. SAGUI			✓			
MS. WHALLEY			✓			
MAYOR NAUGHTON						

I hereby certify that the above Resolution was duly adopted by the Mayor & Borough Council of the Borough of Spring Lake at a meeting held on December 3, 2024.

Dina M. Zahary
Borough Clerk